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In The

# Supreme Court of the United States

October Term, 1994

LINDA M. GREENBLATT,

*Petitioner,*

vs.

SHEARSON LEHMAN HUTTON, INC.,

*Respondent.*

LINDA M. GREENBLATT,

*Petitioner,*

vs.

SHEARSON LEHMAN HUTTON, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## OPPOSITION OF RESPONDENTS AND PLAINTIFFS' CLASS COUNSEL TO PETITION FOR A WRIT OF CERTIORARI

JAMES M. FINBERG
*Counsel of Record*
ELIZABETH J. CABRASER
KAREN E. KARPEN
MORRIS A. RATNER
*Sullivan and Hartley Plaintiffs' Class Counsel*
LIEFF, CABRASER & HEIMANN
Embarcadero Center West
275 Battery St., 30th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## INTRODUCTION

Class counsel in the class actions of which Petitioner Linda M. Greenblatt was a class member oppose Greenblatt's Petition for a Writ of Certiorari. Class counsel submit this brief to correct Greenblatt's misrepresentations to the Court regarding the settlement notices in the underlying *Sullivan* and *Hartley* class actions. Class counsel also respond to Greenblatt's attempted assault on the integrity of all class action settlement notices where, as here, those notices comply with the applicable provisions of Federal Rules of Civil Procedure 23(c)(2) and satisfy the due process requirements set forth in well-established case law.

## ARGUMENT

### I. PETITIONER GREENBLATT MISCHARACTERIZES THE NATURE OF THE NOTICE PROVIDED TO HER, AND OMITS FACTS REGARDING HER CONSENT TO BE BOUND BY THE CLASS ACTION SETTLEMENTS

Greenblatt's sole contention regarding the adequacy of class notice is that the notice did not inform her of the consequences of failing to opt out. Specifically, Greenblatt asserts that the information in the settlement notices concerning the claim preclusion effects thereof was erroneous and misleading. Greenblatt can only make this factual assertion by distorting and/or ignoring key language in the settlement notices.

### A. Greenblatt Mischaracterizes the Settlement Notices.

#### 1. Petitioner Misrepresents the Text of the *Sullivan* Settlement Notice.

Greenblatt's Petition fails to inform the Court of the following provision in the *Sullivan* class settlement notice which clearly expresses the broad claim preclusion effects of participating in the settlement:

> If the proposed settlement is granted final approval by the Court, there will be no trial against the settling defendants, and the class members' claims against the settling defendants, *which relate to Shearson California Radisson Plaza Partners, L.P., will be dismissed with prejudice and released* in return for payment of $5.5 million into the Class Action Settlement Fund and other benefits as described in Paragraph 9. (ER 110, ¶ 6, emphasis added).

The additional claim preclusion portion of the *Sullivan* settlement notice which Greenblatt *does* cite is misleadingly misquoted. The *Sullivan* settlement notice states in paragraph 12(b) that "[b]y remaining a Class member, any claims against the defendants for damages arising out of the defendants' conduct as alleged by the Class will be determined in this lawsuit and cannot be presented by you in any other lawsuit." (ER 111, ¶ 12(b)). The *Sullivan* notice describes the Class claims as follows:

> Plaintiff ARMONCE SULLIVAN, on behalf of herself and all others similarly situated, filed a civil action against defendants . . . asserting claims for alleged violations of the federal securities laws . . . and claims for alleged common law fraud, negligence, and breach of contract,

> arising out of the offer and sale of the Units of limited partnership interest in the Shearson California Radisson Plaza Partners, L.P. ("Units"). (ER 109, ¶ 1).

In her Petition, Greenblatt tries to merge the above-quoted sentence with the sentence which follows it, misleadingly creating an entirely new sentence. Instead of ending the sentence at the period, Greenblatt, at page 57 of her Petition, adds an ellipsis, by which she attempts to append to the sentence a fragment of the following sentence, which reads: "Plaintiff alleges that these Units were offered and sold to the investing public by way of misrepresentations and omissions of material fact which concealed from purchasers important information. . . . "

By failing to inform the Court of broad claim preclusion language in Paragraph 6 of the *Sullivan* settlement notice, and by slicing and dicing those portions of the notice she *does* cite, Greenblatt attempts to mislead the Court into thinking that the *Sullivan* settlement notice claim preclusion provisions were limited to claims involving misrepresentations and omissions. In fact, the claims affected by the settlement notice explicitly relate to any claim "arising out of the offer and sale of the Units . . . " (ER 109, ¶ 1) or which "relate to Shearson California Radisson Partners, L.P." (ER 110, ¶ 6), and cannot reasonably be further limited.

### 2. Greenblatt Similarly Mischaracterizes the Text of the *Hartley* Class Settlement Notice.

Greenblatt's Petition fails to inform the Court of the following provision in the *Hartley* settlement notice

which broadly defines the *res judicata* effects of participating in the class action settlement: "If the proposed settlement is granted final approval by the Court, there will be no trial, and the Class Members' claims against the Defendants will be dismissed with prejudice and released. . . . " (ER 159, ¶ 5).

The *Hartley* settlement notice claim preclusion provision which Greenblatt *does* cite is misquoted. The *Hartley* notice states at Paragraph 11(b) that "[b]y remaining a Class member, any claims against the Defendants for damages arising from the Defendants' conduct as alleged by the Class Action Complaint will be determined in the lawsuit and cannot be presented by you in any other lawsuit." (ER 161, ¶ 11(b)). The notice describes those claims as "arising out of, *among other claims*, defendant Shearson Lehman Hutton, Inc.'s services as a selling agent . . . " (emphasis added). Greenblatt misleadingly excises from her quote in her Petition the phrase "among other claims." (ER 158-159, ¶ 1).

### B. Greenblatt Fails to Apprise the Court of Key Facts Demonstrating Her Consent to Be Bound by the Class Settlements.

Although Greenblatt's Petition is silent on most of these points, there is no dispute on the record below regarding the following facts, all of which demonstrate Greenblatt's informed consent to be bound by the *Sullivan* and *Hartley* settlement notices:

(1) Class settlement notices were sent to Greenblatt, providing at least 30 days notice of the proposed settlements;

(2) The settlement notices apprised Greenblatt of the fact that claims relating to the class action complaints would be barred, and of her right to opt-out of the classes in order to preserve her claims (ER 109, ¶ 1; 110, ¶ 6; 111, ¶ 12; 158, ¶ 1; 159, ¶ 5; 161, ¶ 11).

(3) Greenblatt chose to remain a member of the settlement classes;

(4) Greenblatt chose not to attend the settlement approval hearings, or to appeal the settlements; and

(5) Greenblatt chose to cash the settlement checks.

Here, as in *In re Corrugated Container Litigation*, 643 F.2d 195, 222 (5th Cir. 1981):

> Plaintiffs had an opportunity to opt out of the class and litigate their state claims in state court; more pertinent, they knew that the settlement compromising class members' state claims had been negotiated before they were asked to opt out. Plaintiffs, however, wanted to participate in the class, share the fruits of the class' settlement negotiations, and still be free to litigate their [related] claims. In short, the objectors felt entitled to the bird in the hand while pursuing the flock in the bush. If the objectors felt they could do this, that was their prerogative but in doing so they accepted the risk that they would be precluded.

## II. PETITIONER GREENBLATT'S ATTACK ON THE ADEQUACY OF THE SETTLEMENT NOTICES IS CONTRARY TO WELL-ESTABLISHED CASE LAW

### A. The *Sullivan* and *Hartley* Notices Were Constitutionally Adequate, and Satisfied the Requirements of the Federal Rules of Civil Procedure.

The *Sullivan* and *Hartley* settlement notices met all of the standards of Federal Rule of Civil Procedure 23(c)(2), as well as the constitutional standards for notice that have been repeatedly discussed by the Ninth Circuit, other Circuits, and by this Supreme Court.

The Ninth Circuit Court of Appeals specifically held that the *Sullivan* and *Hartley* settlement notices were constitutionally adequate because they fairly apprised all class members of "the subject matter of the suit, *the proposed terms of the settlement*, and the members' opportunity to be heard" (emphasis added). In *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993), the court held that notice is satisfactory if it "generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Id.*; *see also, Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977) (to be adequate, notice in a class action suit must merely "present a fair recital of the subject matter and proposed terms and give an opportunity to be heard to all class members").

The *Sullivan* and *Hartley* settlement notices met these requirements. Each of these notices generally described the status of the actions and the nature of the class action claims (ER 109, ¶ 1,2; ER 158-159, ¶ 1, 2); defined the

meaning and scope of class certification, including the claim preclusion effects of remaining a class member (ER 109-110, ¶ 3-8; ER 159-160, ¶ 3-7); described the terms of the settlement in detail (ER 110, ¶ 9; ER 160, ¶ 8); invited class members to be heard at the settlement approval hearing (ER 111, ¶ 10-11; ER 160, ¶ 9-10); presented in detail the class members' right to opt-out, and impact of failing to opt-out of the class (ER 111, ¶ 12; ER 161, ¶ 11); and generally addressed the rights and obligations of class members (ER 111, ¶ 13; ER 162, ¶ 12).

Finally, the notices specifically invited class members to contact Class counsel with questions regarding the notice, and to review the pleadings in the case (ER 111-112, ¶ 14, 16; 162, ¶ 13, 14), neither of which Greenblatt opted to do. The notices provided class members over 30 days in which to think about the contents of the notice, and decide whether to opt out.

In short, the notices were constitutionally adequate, and satisfied the requirements of the Federal Rules of Civil Procedure, and of Rule 23(c)(2) in particular. *See, e.g., Torrisi v. Tucson Elec. Power Co.*, 8 F.3d at 1373-75.

### B. The Claim Preclusion Provisions of the Settlement Notices Were Constitutionally Adequate.

The Ninth Circuit Court of Appeals specifically rejected Greenblatt's arguments regarding the constitutional adequacy of the claim preclusion provisions of the class settlement notices. The Court of Appeals held:

> Finally, Greenblatt argues that, even if Shearson is not precluded from seeking enforcement of the settlement releases in District Court, we

> should reject Shearson's defense because the settlement notices failed to adequately inform Greenblatt of the consequences of not opting out of the class actions and were thus constitutionally defective. We reject this argument as well.

In cases involving nearly identical claim preclusion provisions, courts have repeatedly upheld the adequacy of class settlement notices. For example, in *Thompson v. Edward D. Jones & Co.*, 992 F.2d 187 (8th Cir. 1993), the court affirmed the adequacy and enforceability of a class action settlement notice containing nearly identical claim preclusion provisions as the provisions in the *Sullivan* and *Hartley* settlement notices. *Id.* at 191.

In *Thompson*, the settlement notice stated that the settlement barred plaintiffs "from suing the Defendants for all claims that they have or may have in connection with the above-described . . . limited partnerships. . . . " *Id.* at 188. This notice was deemed adequate to bar a plaintiff's claims which the plaintiff, who participated in the settlement, claimed could not have been raised in a class context, and could only be brought on an individual basis. The court held: "Where there is a realistic identity of issues between the settled class action and the subsequent suit, and where the relationship between the suits is at the time of the class action foreseeably obvious to notified class members, the situation is analogous to the barring of claims that could have been asserted in the class action." *Id.* at 191 (citing and quoting *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982)).

Similarly, in *In re VMS Securities Litigation*, Fed. Sec. L. Rep. ¶ 97,301 (N.D.Ill. Feb. 20, 1992), the settlement notice made it clear that it barred any claims "arising out of, or in any way relating to any acts, facts, transactions, occurrences [or] representations" relating to the subject funds' securities. That notice is indistinguishable from the notice in the *Sullivan* and *Hartley* actions, which informed Greenblatt and other class members that by participating in the settlement, they would release any claims "arising out of the offer and sale of the Units. . . ." In *In re VMS Securities Litigation*, the court held that subsequent arbitration proceedings brought by class members who received notice of a proposed settlement and did not opt out of the class were barred by the prior class settlement, even though particular claims raised in the arbitration proceedings were not specifically covered in the class action complaint. *Id.*

## CONCLUSION

With respect to the issue of adequacy of the *Sullivan* and *Hartley* class settlement notices, Petitioner Greenblatt has failed to establish a basis for granting her Petition for Writ of Certiorari. *See* Supreme Court Rules, Rule 10.1(a). As demonstrated above, Greenblatt's Petition misrepresents the nature of the settlement notices she received. In addition, the Ninth Circuit Court of Appeals' decision in *Hartley v. Stamford Towers Ltd. Partnership*, 1994 U.S. App. LEXIS 23543 (9th Cir. Aug. 26, 1994), affirming the adequacy of the notices provided to Greenblatt, comports with the decisions of other Courts of Appeals, and with

the United States Supreme Court. Accordingly, Greenblatt's Petition for Writ of Certiorari should be denied.

DATED: December 28, 1994

Respectfully submitted,

JAMES M. FINBERG
*Counsel of Record*
ELIZABETH J. CABRASER
KAREN E. KARPEN
MORRIS A. RATNER
*Sullivan and Hartley*
*Plaintiffs' Class Counsel*
LIEFF, CABRASER & HEIMANN
Embarcadero Center West
275 Battery St., 30th Floor
San Francisco, CA
94111-3339
Telephone: (415) 956-1000